

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-11

DATE ISSUED: June 8, 1998

ISSUED TO: Foster County Water Resource District Board Chairman
Duane Mullenberg and Attorney Fabian Noack

CITIZEN'S REQUEST FOR OPINION

On April 29, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jim Seitz asking whether the Foster County Water Resource District Board (Board) violated N.D.C.C. §§ 44-04-20 and 44-04-21 by holding a meeting which was not preceded by sufficient public notice and by not keeping minutes of the meeting. On May 19, this office received an additional request from Mr. Seitz alleging that the Board violated N.D.C.C. § 44-04-20 again by holding a meeting on May 12, 1998, that was not preceded by sufficient public notice. Mr. Seitz also alleged that the Board, through its attorney Fabian Noack, violated N.D.C.C. § 44-04-18 by denying Mr. Seitz's request for a copy of the minutes of the May 12 meeting.

FACTS PRESENTED

On April 21, 1998, a quorum of the Board and its attorney gathered for breakfast at 6:00 a.m. at a Carrington restaurant. According to the Board's attorney:

The only purpose of said get together was to review the agenda for the next board meeting to be held on May 12; and further, requested I obtain some information from the water commission which could be reported upon at the May 12 meeting.

In a follow-up conversation with this office, Mr. Noack indicated that the Board also asked Mr. Noack to gather certain information to present to the Board at its May 12 meeting. Mr. Noack's response to this office's inquiry indicates that no notice or minutes were prepared because he believed the breakfast gathering was not a "meeting" of the Board subject to N.D.C.C. §§ 44-04-19, 44-04-20, and 44-04-21.

Notice of the May 12 meeting of the Board was personally provided to Mr. Seitz, but the notice was not filed with the county auditor or posted at the location of the meeting on the day of the meeting.¹ According to the county auditor, no annual schedule of the Board's regular meetings was filed as required under N.D.C.C. § 44-04-20(3).

Mr. Noack disputes Mr. Seitz's claim that he requested minutes of the May 12 meeting on May 13, but in response to this office's inquiry, Mr. Noack has agreed to send Mr. Seitz a copy of the minutes. Having been notified by this office of Mr. Seitz's request, failure to provide the minutes would be a violation of N.D.C.C. § 44-04-18.

ISSUES

1. Whether the April 21 breakfast gathering of the Board was a "meeting" under N.D.C.C. § 44-04-19 and therefore required to be preceded by public notice under N.D.C.C. § 44-04-20 and summarized in sufficient minutes under N.D.C.C. § 44-04-20.
2. Whether the Board provided sufficient notice of its May 12 regular meeting under N.D.C.C. § 44-04-20.
3. Whether the Board and Mr. Noack violated N.D.C.C. § 44-04-18 by refusing to provide copies of the minutes of the May 12 Board meeting to Mr. Seitz.

ANALYSES

Issue One:

The board of a water resource district is the "governing body" of a "public entity" as those terms are defined in N.D.C.C. § 44-04-17.1(6), (12)(b). See also N.D.C.C. § 44-04-17.1(10) ("political subdivision" includes water resource districts.) Therefore, any "meeting" of the Board must be open to the public under N.D.C.C. § 44-04-19, preceded by sufficient public notice under N.D.C.C. § 44-04-20, and summarized in sufficient minutes under N.D.C.C. § 44-04-21.

"Meeting" is defined as any gathering of a "quorum of the members of the governing body of a public entity regarding public business."

¹ The Board does not have a main office.

N.D.C.C. § 44-04-17.1(8)(a). This definition does not include social gatherings as long as public business is not considered or discussed. N.D.C.C. § 44-04-17.1(8)(b). "Public business" includes all matters that relate to a public entity's performance of its governmental functions or use of public funds. N.D.C.C. § 44-04-17.1(11).

"[I]f the topic of conversation involves the Board's 'public business,' the gathering is a 'meeting,' even if dinner or lunch is served during the meeting." 1998 N.D. Op. Att'y Gen. O-27, O-30 (March 3 opinion to Paul Ebeltoft, President, State Board of Higher Education).

"[I]t would be appropriate for the presiding officer of a governing body to contact the other members to determine which items to include on the agenda of the next meeting, as long as the conversations do not include information-gathering or discussion regarding the substance of the issues on the agenda. It is only when those meetings become steps in the decision-making process (information gathering, discussion, formulating or narrowing of options, or action) regarding public business that the open meetings law is triggered.

1998 N.D. Op. Att'y Gen. O-27, O-32 to O-33.

Mr. Noack's responses to this office on behalf of the Board indicate that, although the Board did not transact any official business at its gathering on April 21, the Board's discussion went beyond listing agenda items and included substantive discussion of the Board's public business. As this office indicated in a 1996 opinion, public business need not be transacted for a gathering to be a "meeting." 1996 N.D. Op. Att'y Gen. 38, 43. Rather, any discussion or receipt of information regarding public business at a gathering of a quorum of the Board is a "meeting" under N.D.C.C. § 44-04-17.1(8). A gathering at which a governing body requests information from its staff for the body's next meeting involves substantive discussion regarding public business and is a "meeting."

Because the April 21 gathering included substantive discussion of Board business, it is my opinion that the gathering was a "meeting" required to be open to the public, preceded by sufficient public notice, and summarized by sufficient minutes.

Issue Two:

Notice of each regular meeting of a county water resource district board must be 1) provided to anyone who has requested it, 2) filed with the county auditor, and 3) posted at the entity's main office (if any) and at the location of the meeting. N.D.C.C. § 44-04-20(4), (5). Filing a notice with the county auditor is not required if all the information contained in the notice has been included in an annual schedule previously filed with the auditor, but the notice still must be prepared and posted. N.D.C.C. § 44-04-20(4).

Notice of the Board's May 12 meeting was provided to Mr. Seitz and a few other interested individuals. It is not sufficient that the Board, or its attorney, provide notice to each person it feels may be interested in a particular meeting. Notice must also be filed with the county auditor and posted at the meeting location so any other member of the public can learn about and attend the meeting.

Here, the Board and Mr. Noack failed to file any annual schedule or notice of the Board's May 12 regular meeting with the county auditor. It is my opinion that the notice provided of the Board's May 12 meeting was therefore not sufficient under N.D.C.C. § 44-04-20.

Issue Three:

Minutes of a meeting of a governing body, even if only in draft form, are open records and must be provided upon request. N.D.C.C. §§ 44-04-18, 44-04-21(2). Mr. Noack does not dispute this requirement, but claims that Mr. Seitz never asked for the minutes.

Attorney General's opinions under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity. As this section indicates, the opinion process under N.D.C.C. § 44-04-21.1 is designed to address disputed questions of law in a given factual situation rather than resolve factual disputes. Whether a person has requested minutes, either in draft or approved form, is a question of fact. Therefore, I must assume, without weighing the credibility of the opinion requester against the public entity, that the minutes were never requested. Accordingly, it is my opinion that the Board did not violate N.D.C.C. § 44-04-18.

CONCLUSIONS

1. The April 21 breakfast gathering of the Board was a "meeting" required to be open to the public, preceded by public notice, and summarized in sufficient minutes.

2. The Board violated N.D.C.C. § 44-04-20 by not providing sufficient notice of its regular meeting on May 12.
3. Based on information received from the Board, the Board did not violate N.D.C.C. § 44-04-18 because it did not receive a request for the minutes of its May 12 meeting.

STEPS NEEDED TO REMEDY VIOLATIONS

The failure to give notice of these meetings cannot be completely remedied because no recording was made and any minutes or notes of the meetings at this point would be incomplete at best. To remedy the violations described in this opinion as much as possible, the Board must convene an open meeting, preceded by sufficient public notice, to recreate the discussion that occurred at those meetings. During the meeting, the Board members must describe, to the best of their ability, the discussion and opinion each member expressed during the meetings described in this opinion. The Board members also must respond to questions from the public regarding their conversations with each other at the meetings. See 1998 N.D. Op. Att'y Gen. 0-27.

In addition, any action taken at a meeting that has not been held in compliance with N.D.C.C. §§ 44-04-19, 44-04-20, or 44-04-21 is voidable by a court. N.D.C.C. § 44-04-21.2(2). Therefore, any action taken by the Board at these meetings must be reconsidered at an open meeting preceded by sufficient public notice.

Failure to disclose a record, issue a notice of a meeting, or take other corrective measures as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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